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No. _____

In The Supreme Court of the United States

OCTOBER TERM 1997

MARIE PFAU,

Petitioner,

v.

**WILLIAM REED,
IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
THE DEFENSE CONTRACT AUDIT AGENCY,**

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

SUPPLEMENTAL APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	A-95-CA-135 ADA
	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY, ET AL.	§	

ORDER

Before the Court is the Motion to Dismiss of Defendants Defense Contract Audit Agency, William Reed, in his Official Capacity as Director of the Defense Contract Audit Agency ("DCAA"), United States Department of Defense ("DOD"), William J. Perry, in his Official Capacity as Secretary of Defense, and Pete Gonzales, in both his official and individual capacity, ("Defendants") filed on July 24, 1995 (Clerk's Doc. No. 16). Plaintiff Marie Pfau filed her Response to the Defendant's Motion on August 7, 1995 (Clerk's Docket No. 21).

This is a Title VI claim. Plaintiff has also alleged violations of the Civil Rights Act of 1991, 42 U.S.C. § 1977A. Plaintiff was an employee of the DCAA, a component of the DOD, with a duty station in Austin, Texas. The Defendants terminated the Plaintiff on November 9, 1993. The plaintiff maintains that she was terminated on the basis of her gender, that her workplace was a hostile work environment, or that her termination was an

act of retaliation.

Who is a Properly Named Defendant?

The Defendants argue that the court should dismiss the Plaintiff's claims against all of the Defendants other than the Secretary of Defense. The Defendants argue that Title 42 U.S.C.§ 2000e-16(c) and Title 42 U.S.C. § 2000e-5 restricts the universe of potential defendants to the head of the appropriate agency or department. In this case, the Secretary of Defense is the head of the Department of Defense. 10 U.S.C. § 113. Defendant DCAA argues that it does not qualify as a department or independent agency. Rather, Defendants argue, it is a subdivision of the Department of Defense. The Plaintiff argues that Title 32 C.F.R. § 357.3 establishes the DCAA as a "separate agency of the department of Defense."

Defendants Reed and Gonzales also argue that they should not be named as Defendants. They argue that the department head is the sole proper defendant in a Title VII action. Brown v. Department of Army, 854 F.2d 77 (5th Cir. 1988). Plaintiff responds that if DCAA is properly named as a separate agency, then Defendant Reed, the director of the DCAA, is properly named. Plaintiff argues that Defendant Gonzales is alleged to have intentionally inflicted emotional distress on her; therefore, he is properly named as a Defendant. The Court finds that the Defendants have failed to persuade it that any of the Defendants should be dismissed from the case.

Are Plaintiff's Tort Claims Preempted?

Defendants argue that the Plaintiff's claim of intentional infliction of emotional distress is preempted by the Civil Service Reform Act of 1978 ("CSRA"). Defendants argue that the

CSRA is a detailed comprehensive effort by the Congress to regulate employee-management relations in the federal government. Defendants argue that Congress can, and has in this case, precluded judicial review of claims that arise in federal employment decisions. Defendants cite a host of cases that hold that CSRA precludes relief under the Federal Torts Claims Act.

Defendants argue that Plaintiff cannot raise a claim of intentional infliction of emotional distress under the FTCA. The Plaintiff argues that the Fifth Circuit has determined that a person can bring such a claim under the FTCA. Truman v. United States, 26 F.3d 592, 595 (5th Cir. 1994). The Plaintiff has correctly cited Fifth Circuit law. The Truman case clearly allows the Plaintiff to proceed with this claim.

Defendants argue that CSRA preempts state law remedies for adverse personnel actions. Plaintiff argues that her claim of intentional infliction of emotional distress does not arise from an adverse employment decision, but from other wrongful actions taken by these Defendants. She argues that her cause of action is not a Bivens or constitutional tort type claim.

Exhaustion of Administrative Remedies Under the FTCA.

Defendants argue that section 2675(a) of the FTCA, 28 U.S.C. 2675(a), prohibits the institution of a judicial tort action "unless the claimant has first presented the claim to the appropriate federal agency and his claim has been denied by the agency in writing. Defendants argue that exhaustion is a jurisdictional prerequisite. Shah v. Quinlin, 901 F.2d 1241, 1244 (5th Cir. 1990). The Plaintiff responds that the parties have already spent two years in administrative review, and that the administrative process has concluded with a final agency decision. The Plaintiff has already presented a sum certain at

the time that she filed her charge.

The Court DENIES the Defendants' Motion to Dismiss.

SIGNED this the 9th day of Austin [sic], 1995, at Austin, Texas.

Alan D. Albright

ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	A-95-CA-135 ADA
	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY, ET AL.	§	

ORDER

Before the Court is the Motion to Reconsider of Defendants Defense Contract Audit Agency, William Reed, in his Official Capacity as Director of the Defense Contract Audit Agency ("DCAA"), United States Department of Defense ("DOD"), William J. Perry, in his Official Capacity as Secretary of Defense, and Pete Gonzales,[1] in both his official and individual capacity, ("Defendants") filed on August 21, 1995 (Clerk's Doc. No. 23). Plaintiff Marie Pfau filed her Response to the Defendant's Motion on August 31, 1995 (Clerk's Docket No. 24). A hearing was held on October 10, 1995.

It is undisputed that the Plaintiff was an employee of the DCAA, a component of the DOD, with a duty station in Austin, Texas. As such, the Plaintiff was a federal civil-service employee. The Defendants terminated the Plaintiff on November 9, 1993. The Plaintiff maintains that she was terminated on the basis of her gender, that her workplace was a hostile work environment, and that her termination was an act of retaliation.

[1]Defendant Gonzales is Plaintiff's former first-line supervisor.

She alleges that the Defendants violated her rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. Plaintiff has also alleged violations of the Civil Rights Act of 1991, 42 U.S.C. § 1977A. The Plaintiff also seeks recovery for her claim of intentional infliction of emotional distress.

Who is a Properly Named Defendant?

The Defendants argue that the Court should dismiss the Plaintiff's claims against all of the Defendants other than the Secretary of Defense. The Defendants argue that Title 42 U.S.C. Section 2000e-16(c) restricts the universe of potential civil rights defendants to the head of he appropriate agency or department. Brown v. Department of Army, 854 F.2d 77, 79 (5th Cir. 1988). In this case, the Secretary of Defense is the head of the Department of Defense. 10 U.S.C. § 113. The Plaintiff argues that the statutory definition of "employer" includes "any agent of such a person" engaged in an industry affecting commerce, and that all of the named Defendants fall within that provision. The Court has reconsidered its earlier decision, and is of the opinion that it erred. The statue is clear. The Plaintiff has misread the statutory definition of "employer," and has misconstrued the plain wording of § 2000e-16. The definition of employer in § 2000e-16 pertains to private, or non-government parties. The Court finds that the Defense Contract Audit Agency is a separate "department, agency, or unit" for Title VII purposes. William Reed, as the Director of the DCAA, is the sole proper Defendant to the Title VII claim of gender discrimination.

Are Plaintiff's Tort Claims Preempted?

Defendants argue that the Plaintiff's claim of intentional infliction of emotional distress is preempted by the Civil Service

Reform Act of 1978 ("CSRA")[2] and by Title VII of the Civil Rights Act of 1964. The CSRA is a detailed comprehensive effort by Congress to regulate employee-management relations in the federal government. The CSRA replaced the old civil-service system to provide "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 672 (1988). The court finds that the CSRA provides the exclusive remedy for claims of federal employees arising out of civil service employment context. Rollins v. Marsh, 937 F. 2d 134, 139 (5th Cir. 1991). The Plaintiff's claims concern allegations of continuing harassment and denial of employment privileges and opportunities in the workplace. The Court has carefully reviewed the Plaintiff's allegations in her pleadings, and is of the opinion that her claims address issues of her employment and are therefore preempted by the CSRA.

The Plaintiff also asserts a Title VII claim. The CSRA expressly reserves federal employees' rights and remedies under anti-discrimination statues, including Title VII. The Defendants argue that Title VII and/or the CSRA provide the Plaintiff with the exclusive remedies with regard to her particular claims. The Court relies on the case of Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404 (1983), in which the Supreme Court held that because the plaintiff's claims arouse out of an employment relationship that was governed by the CSRA that allowed meaningful remedies against the United States, that it would be improper to supplement that regulatory scheme with a nonstatutory damages remedy. The Supreme Court noted that the CSRA is a comprehensive and exhaustive administrative-scheme. Id. at 2417.

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[2]Pub.L. No. 95-454, 92 Stat. 1111 et seq., (codified as amended at 5 U.S.C.).

The Court has reexamined the case of Truman v. United States, 26 F. 3d 592, 595 (5th Cir. 1994) in light of the Defendants' Motion for Reconsideration. The Defendants argue that none of the cases that the Fifth Circuit relied on in the Truman decision involved a suit in which the government argued that the CSRA or Title VII barred the tort claim. The Defendants emphasize that the plaintiff in Truman was not a government employee, but was a private employee asserting a FTCA claim. Had Truman been a government employee the Fifth Circuit would have barred her tort claim. The Court holds that, to the extent that Plaintiff's claim of intentional infliction of emotional distress involve allegations of adverse employment decisions, that those claims are precluded by the CSRA.

The Court next addresses whether Plaintiff's remaining claims for intentional infliction of emotional distress are preempted by Title VII. Plaintiff again argues that her claim of intentional infliction of emotional distress does not arise from an adverse employment decision, but from other wrongful actions taken by these Defendants. In response, the Defendants note that in the Plaintiff's First Amended Complaint, the Plaintiff relies on the same factual allegations to support her Title VII clams as she does for her claim of intentional infliction of emotional distress. The Court finds that the factual predicate for the Plaintiff's claim is also the basis of her Title VII claim.

The Court is of the opinion that the better-reasoned decisions that have addressed this question have held that Title VII is the exclusive judicial remedy for claims of discrimination in federal employment. Madrid v. Rice, 730 F. Supp. 1078, 1083 (D. Wyo. 1990) (citing, Brown v. General Services Administration, 425 U.S. 820, 833-34, 96 S.Ct. 1961, 1968-69 (1976)). The Court holds that the CSRA and Title VII preempt the Plaintiff's state law claims for intentional infliction of emotional distress. The Court DISMISSES WITH PREJUDICE the Plaintiff's claim for intentional infliction of emotional

distress.

The Court GRANTS the Defendants' Motion for Reconsideration.

SIGNED this the 24th day of October 1995, at Austin, Texas.

Alan D. Albright

ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	CIVIL NO.
	§	A-95-CA-135 AA
	§	
WILLIAM REED, IN HIS	§	
OFFICIAL CAPACITY	§	
AS DIRECTOR OF THE	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY	§	

ORDER

Before the Court are Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment and Appendix to Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment (Clerk's Doc. No. 52 and 53); Plaintiff's Objections to Defendant's Summary Judgment Evidence (Clerk's Doc. No. 67); Plaintiff's Response to Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment (Clerk's Doc. No. 68); Defendant's Reply to the Plaintiff's Response to the Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment (Clerk's Doc. No. 69); Defendant's Objections to Plaintiff's Evidence in Opposition to Defendant's Motion for Summary Judgment and Supplemental Appendix

(Clerk's Doc. No. 70 and 71) and Plaintiff's Objections to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment (Clerk's Doc. No. 72). Oral arguments from both parties were heard on July 9, 1996.

General Background.

This is a Title VII wrongful termination case against Plaintiff's former employer the Defense Contract Audit Agency in Austin, Texas. Plaintiff also alleges sex discrimination, a hostile work environment, *quid pro quo*, and reprisal and retaliation for filing charges of sex discrimination.

Plaintiff was employed by the Defense Contract Audit Agency for ten years before she was involuntarily terminated on November 9, 1993. She alleges that after her transfer to the team headed by Pete Gonzales ("Gonzales") in October 1992, Gonzales began making sexual advances toward Plaintiff and subjected her to lewd and suggestive remarks. Plaintiff alleges that as a result of her rebuff of him, Gonzales began to exclude Plaintiff from participation in work team events, although he did not discontinue his suggestive remarks to Plaintiff and about Plaintiff to others. Plaintiff alleges that as a result of an incident where Gonzales appeared at her home and demanded that they become involved, she filed charges of sexual harassment and discrimination against him along with charges of retaliation and reprisal.

Plaintiff alleges that when she requested leave in December of 1992 Gonzales began insisting that he accompany Plaintiff on her planned trip and that she pay his way. Plaintiff alleges that Gonzales asked her for money on several more occasions.

Plaintiff alleges that Gonzales retaliated against her for filing her charges of discrimination by hindering her performance, denying her critical training, giving her assignments of lowe

complexity that were incommensurate with her experience and training, and isolating Plaintiff from the rest of the audit team.

Plaintiff alleges that during the investigation of her sexual harassment charge, DCAA counselors pressured Plaintiff to withdraw her charges in exchange for a transfer or promises that her impending termination would be halted. After she refused to withdraw her charges, Plaintiff alleges that she was placed on a performance improvement plan and ultimately terminated in retaliation for her claims. Plaintiff alleges that DCAA counselors failed to document her complaints and were slow in acknowledging her complaints. Plaintiff further alleges that DCAA counselors failed to examine her sexual harassment complaint. Plaintiff alleges that Defendants failed to take action to halt the sexual harassment, discrimination, and retaliation by Plaintiff's supervisor Gonzales, and failed to perform an impartial evaluation of her performance and charges.

Plaintiff requests front pay, back pay, benefits, reinstatement, prejudgment and postjudgment interest, and attorney's fees and costs. Defendant responds that Plaintiff has failed to make out the requisite elements of either a *quid pro quo* or a hostile work environment sexual harassment claim.

The Motion to Dismiss/Motion for Summary Judgment.

The Defendant contends that the Plaintiff cannot establish a *prima facie* [sic] against the Defendant. Defendant contends that Plaintiff has not proven the necessary element of *respondent superior* -- that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Collins v. Baptist Memorial Geriatric Center*, 937 F.3d 190, 195-96 (5th Cir. 1991) *cert. denied*, 502 U.S. 1072, 112 S.Ct.

968. Under Rule 56(c),[1] the party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53 (1986); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). In *Celotex*, the Supreme Court wrote:

> In our view, the plain language of Rule 56(b) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23. In *Celotex*, the Supreme Court further instructed that the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327. If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of a genuine issue of material fact for

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[1]Rule 56(c), Fed. R. Civ. P. provides, in pertinent part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56 (1986). The burden on the non-moving party is to do more than simply establish that there is some metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355-56. In ruling on a motion for summary judgment, the court must believe the evidence offered by the non-movant and draw all justifiable inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986).

The Plaintiff has filed a claim under Title VII. Title VII provides that it shall "be an unlawful employment practice for an employer--(l) to discriminate against any individual with respect to his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The order and allocation of burdens of production in actions involving allegations of discrimination under Title VII generally follow a three step progression:

(1) the plaintiff must first establish a *prima facie* case of discrimination;[2]
(2) if the plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action with respect to the plaintiff;[3]
(3) if the defendant articulates such a reason, the plaintiff must prove by a preponderance of the evidence that the reason proffered by the defendant is false and merely a

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[2]The Plaintiff does this by presenting evidence sufficient to create an inference that the adverse action complained of was more likely than not motivated by discrimination. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

[3]See, Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1478 n.19 (5th Cir. 1992).

pretext for intentional discrimination.

St. Mary's Honor Center v. Hicks, 509 U. S. 502, 113 S.Ct. 2742, 2747-48 (1993) (*citing*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)). It is critical to recall that in discrimination cases, the plaintiff always retains the ultimate burden or [sic] persuasion. *St. Mary's*, 113 S.Ct. 2747.

The Court first addresses the question of whether the Plaintiff has established a *prima facie* claim for discrimination under Title VII. As a general matter, a plaintiff can establish a *prima facie* case of discrimination using circumstantial evidence by proving:

(1) the plaintiff is a member of a protected class;
(2) the plaintiff, while qualified, suffered an adverse employment action; and
(3) other employees outside of the protected class were not treated in a similar manner under circumstances from which discrimination could be inferred.

The plaintiff's *prima facie* burden is not onerous. The plaintiff is required to come forward and point out specific evidence that gives rise to an inference of discriminatory animus. If a plaintiff fails to present sufficient evidence to establish a *prima facie* case of discrimination, then the court is to grant summary judgment against the plaintiff. *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292 (5th Cir. 1994). Plaintiff bases her claims for discrimination under two theories of sexual harassment: hostile work environment and *quid pro quo* harassment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405-06 (1986). The court addresses the elements of each cause of action in turn.

***Prima Facie* Case of Sexual Harassment.**[4]

A. Hostile Work Environment.

The Fifth Circuit has set out five elements a plaintiff is obliged to prove in order to establish a *prima facie* case of sexual harassment of the hostile work environment variety. To survive summary judgment, Ms. Pfau must at least create a genuine issue of material fact as to each of the following factors:

(1) the employee belongs to a protected group;
(2) the employee was subject to unwelcome sexual harassment, i.e., sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or uninvited and is undesirable or offensive to the employee;
(3) the harassment complained of was based upon sex;
(4) the harassment complained of affected a "term, condition or privilege of employment," i.e., the sexual harassment must be sufficiently severe as to alter the conditions of employment and create an abusive working environment; and;
(5) *respondeat superior*, i.e., that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Waltman, 875 F.2d at 477 (alterations omitted) (citing *Jones v. Flagship Int'l*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert.*

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[4] The court notes that although at trial Ms. Pfau has the burden of proving every element of her prima facie case to state a claim, such is not the case with a motion for summary judgment. In this situation, Plaintiff need only raise a genuine issue of material fact concerning the elements of her prima facie case. *Waltman*, 875 F.2d at 477 (citing *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633, 640-41 (5th Cir. 1985)).

denied, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1001 (1987)).

Generally, in order to bring a cause of action for hostile work environment, a plaintiff must establish that the challenged conduct created an environment that a reasonable person would find hostile or abusive. *Harris v. Forklift Systems, Inc.*, __ U.S. __ , 114 S.Ct. 367 (1993) (citing *Meritor Savings Bank v. Vinson*,, 477 U.S. 57, 106 S.Ct. 2399 (1986). The Supreme Court held that a plaintiff claiming to be a victim of a hostile working environment must establish that the wrongful conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment. The determination of whether a work-place environment is hostile or abusive depends on the totality of circumstances, focusing on factors such as the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with the employee's work performance. *Id.*, at ___, 114 S.Ct. at 371.

In the present case, Defendant contends that Plaintiff cannot meet her summary judgment burden and establish a genuine issue of material fact with regard to the fifth factor of her prima *facie* case.

B. Quid Pro Quo.

The second type of sexual harassment claim available under Title VII is the *quid pro quo* theory of harassment. To prevail under this theory, the plaintiff must prove that:

(1) she is a member of a protected group;
(2) she was subject to unwelcome sexual harassment;
(3) the complained-of harassment was based upon sex;
(4) her reaction to the harassment affected tangible aspects of the terms and conditions of her employment, with her acceptance or rejection of the harassment being either

an express or implied condition to receipt of a benefit to or the cause of a tangible adverse effect on the terms or conditions of her employment; and

(5) *respondeat superior*.

Ellert v. University of Tex., 52 F.3d 543, 545 (5th Cir. 1995) (citing *Collins v. Baptist Mem. Geriatric Ctr.*, 937 F.2d 190, 196 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072, 112 S.Ct. 968. The court notes again, however, that Ms. Pfau need not conclusively prove the above elements to defeat summary judgment; she need only demonstrate that Defendant cannot show the absence of genuine issues of material fact as to each element. Once again, the Defendant disputes the fifth factor of Plaintiff's *quid pro quo* case.

Defendant's Contentions with Regard to the Fifth Factor, *Respondeat Superior.*

In support of its contention that Plaintiff has not offered evidence to create a genuine issue of material fact as to the fifth factor of respondeat superior, Defendant has provided the Court with summary judgment evidence in support of its motion (Clerk's Doc. No. 52). Defendant offers that Plaintiff admitted that she did not advise Gonzales until December 7, 1992 that his calls to her apartment were unwelcome. Defendant further offers that Plaintiff admitted in her deposition that after December 9, 1992 Gonzales ceased calling her at her apartment and ceased making any sexually harassing comments. Defendant further offers that Plaintiff did not make any complaints of sexual harassment to DCAA management until December 9, 1992 when Plaintiff wrote a letter to William Reed complaining about the calls to her apartment and an incident on December 3, 1992 when Gonzales asked her to "stand by him" instead of in front of his desk. Defendant offers the sworn affidavit of James C. Bourne stating that before Plaintiff's December 9,

1992 complaint of sexual harassment he had not been aware of any complaints, allegations, or accusations of sexual harassment by any other DCAA employees concerning employee Gonzales. Plaintiff offers no summary judgment evidence to contradict Bourne's affidavit. Bourne also attested that he had never seen Gonzales engage in sexually harassing behavior and that Pfau made no further complaints of sexual harassment after December 9, 1992. Affidavit of James C. Bourne, Page 1. Defendant also offers the affidavit of Harold Lamb that supervisory auditors, such as Gonzales, had no authority to hire, fire, or demote any DCAA employee; that Lamb was unaware of any allegations of sexual harassment by DCAA employees until Plaintiff complained; and that he never witnessed Gonzales sexually harass Plaintiff or any other DCAA employee. Affidavit of Harold Lamb. The Defendant also offers the sworn affidavit of Dennis Low stating that he was also unaware of such behavior on the part of Gonzales and was unaware of complaints of harassment by any DCAA employees. Defendant contends that DCAA had not received any sexual harassment complaints regarding Gonzales and did not know of any unwelcome sexual harassment on the job of Plaintiff by Gonzales prior to December 9, 1992. Defendant contends that it did not have actual or constructive knowledge of the sexual harassment Plaintiff alleges until after Gonzales had ceased harassing Pfau. In summary, Defendant claims that it cannot be held liable under either of Plaintiff's theories of sexual harassment and that therefore, summary judgment is appropriate.

Defendant contends that once it received notice of the alleged sexual harassment of Plaintiff by Gonzales, DCAA took "prompt remedial action." Defendant maintains that the DCAA EEO counselor Paula McFarland, met with Plaintiff and Gonzales on December 21, 1992. Affidavit of Paula McFarland. Defendant maintains that during that meeting, Plaintiff advised Ms. McFarland that since she, Plaintiff, had received no

further phone calls nor had Gonzales made any more sexually oriented comments, and that she, Plaintiff, deemed the sexual harassment problem solved. Defendant has offered uncontroverted summary judgment evidence that during that meeting with Gonzales and Plaintiff, that McFarland advised Gonzales that he was not to call Plaintiff's home. Paula McFarland Affidavit, Defendant's Exhibit F. The Defendant has proffered the affidavit of DCAA Austin Branch Manager Harold Lamb in which he states that after the meeting he also instructed Gonzales not to telephone any DCAA employee at home and admonished Gonzales concerning the sexual harassment alleged by Plaintiff. Plaintiff does not dispute that this meeting took place or that Defendant admonished Gonzales for his behavior.

Plaintiff's Response.

Plaintiff contends (Clerk's Doc. No. 67) that since Gonzales was Plaintiff's "employer" at the time he harassed Plaintiff, knowledge of the harassment is inferred to DCAA making DCAA liable under the theory of *respondeat superior*. The Court notes that individuals may not be held liable under Title VII unless they meet the statutory definition of "employer," however, individual employee's actions may subject employer to liability under agency principles. *Patterson v. P.H.P. Healthcare Corp.*, 1996 WL 420169 (5th Cir. (Tex.)). Plaintiff argues that under the holding in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), Gonzales was Plaintiff's "employer" because he significantly controlled the terms, conditions, and privileges of her employment. The Court further notes that employers are liable under Title VII in accordance with common-law agency principles where acts of employees are committed in furtherance of the employer's business, but employers are not liable for every discriminatory act committed by employees in the workplace. Employer liability requires direct relationship between allegedly discriminatory conduct and employer's

business. *Long v. Eastfield College*, 88 F.3d 300 (5th Cir. 1996). In the alternative, Plaintiff argues that in the absence of actual authority Gonzales had apparent authority adequate to deem him Plaintiff's "employer." Plaintiff also argues that she gave DCAA actual notice of sexual harassment prior to December 9, 1992, and as early as April 16, 1992. Plaintiff further argues that DCAA had constructive knowledge of Gonzales' sexually harassing conduct because that conduct was so blatant that DCAA should have known of it. Furthermore, Plaintiff maintains that the general and pervasive atmosphere of sexual harassment at DCAA gave DCAA constructive notice of sexual harassment in her specific case. Lastly, Plaintiff argues that Defendant DCAA did not take prompt action regarding Plaintiff's sexual harassment complaint after receiving either actual or constructive notice.

Plaintiff argues that Defendant's contention that it had neither actual or constructive knowledge that Gonzales was harassing Plaintiff prior to December 9, 1992 is erroneous. Plaintiff argues that Defendant's reliance on *Nash v. Electro-space System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993), and *Valdez v. Church's Fried Chicken*, 683 F.Supp at 619-20, is improper. Plaintiff argues that these cases are distinguishable from her own because these cases involve harassment by co-workers and her case involves harassment by a supervisor. Plaintiff argues that if a supervisor influences the terms, conditions, and privileges of a worker's employment, that he qualifies as the employer and knowledge is thereby imputed to the employer. Plaintiff relies on *Flanagan v. Aaron E. Henry Community Health Servs. Ctr.*, 876 F.2d 1231 (5th Cir. 1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S.Ct. 2399, 2405-06 (1986); and *Garcia v. Elf Atochem N. Amer.*, 28 F.3d 446 (5th Cir. 1994). Plaintiff also cites cases from other Circuits as authority.

Plaintiff further argues that it has offered summary judgment

evidence showing that other managers were aware that Gonzales was sexually harassing Plaintiff prior to December 9, 1992; that Plaintiff was being sexually harassed by DCAA employees other than Gonzales; that Gonzales was harassing other female DCAA employees; and that other female DCAA employees were being harassed by supervisors other than Gonzales. Pfau relies on her own affidavit in which she states that she witnessed Gonzales harass DCAA employees Letty Vasquez and Tonya Scherchyl by asking them out to lunch, telephoning them, and behaving "sexually aggressive toward them in an intimidating manner." Pfau Exhibit A, Pfau Affidavit, Para. 6. Plaintiff offers no other affidavits in support of this contention. Defendant objects to this evidence because it contains the legal conclusion that these actions constituted "sexual harassment." Defendant contends that only the affidavits of Vasquez and Scherchyl stating that the calls, invitations, and actions would render this evidence relevant. Plaintiff has failed to proffer these affidavits. The Court finds that mere conclusory allegations are incompetent summary judgement [sic] evidence and are insufficient to defeat a motion for summary judgment. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1994). Therefore, the Court finds that the Plaintiff has failed to proffer competent summary judgment evidence in support of this issue.

Plaintiff states in her affidavit that she informed the management at the DCAA Austin office about Gonzales' behavior prior to December 9, 1992 and that the Defendant took no remedial action. *Id.* Plaintiff cites an April 16, 1992 letter she wrote to the Central Regional EEO Officer at the DCAA Irving, Texas, office in which she complained that Jess Soto, her immediate supervisor at the time, had enlisted the aid of another female auditor to make inquiries of Pfau regarding her personal life. Pfau Affidavit, Page 4, Para. 16. Pfau also contends that she sent copies of this letter to Soto, Dennis Low, and Dale Collins, Director of Personnel at DCAA Headquarters in Alexandria,

Virginia. Plaintiff also cites a Memorandum written by Michael Gonzales dated August 19, 1992, in which he summarizes Pfau's complaints and states that he informed Lamb, Soto, Low, and Kirschbaum of Plaintiff's complaints. Plaintiff contends that DCAA took no other action regarding her complaint of sexual harassment. Plaintiff also contends that she informed her employer of the hostile environment in a memo to Collins written September 12, 1992. In her September 12, 1992 memo Pfau stated that "The responsibility of management to prevent forms of sexual harassment is not being performed." Pfau Exhibit A, Pfau Affidavit, Page 5, Para. 17. Plaintiff offers no evidence that she informed the Defendant of specific instances of sexual harassment involving specific individuals.

Plaintiff asserts that DCAA failed to take prompt remedial action after receiving either actual or constructive knowledge the Plaintiff was being harassed. This argument rests on the theory that DCAA had constructive knowledge of the harassment when Gonzales committed the first act of harassment prior to December 1992. Additionally, Plaintiff argues that she gave actual notice of the harassment by Gonzales to other DCAA managers prior to December 1992. Plaintiff offers no summary judgment evidence in support of this contention.

Lastly, Plaintiff contends that after filing her formal complaint, DCAA did little to correct the situation. She contends that it took DCAA six weeks to investigate the complaint, that Gonzales remained her immediate supervisor, and that DCAA did not discipline Gonzales. Plaintiff also contends that Gonzales continued his harassment of her after she made her formal complaint. Plaintiff argues that Gonzales received no formal counseling from the Defendant after she filed her formal complaint. Gonzales Deposition, Page 154, Lines 23-25. Defendant argues that this is incorrect and not in dispute because it is uncontested that Gonzales attended DCAA EEO training regarding proper behavior in the workplace and

received documentation regarding DCAA's prohibition against sexual harassment in the workplace. Gonzales Deposition, Page 155, Lines 2-22.

Plaintiff also contends that the harassment did not cease after December 9, 1992. Plaintiff has offered summary judgment evidence relating to a business trip she took to Corpus Christi, Texas. At some prior point Gonzales asked Plaintiff where she would be staying in Corpus Christi, Texas. Pfau Affidavit, Page 5, Para. 21. Defendant counters with summary judgment evidence that Plaintiff willingly gave Gonzales the phone number of her hotel, did not inform Gonzales that the request was unwelcome, and that Gonzales did not try to call her or visit her in Corpus Christi. Pfau Deposition, Page 242-44. The Court finds that there is no evidence of discriminatory animus in the single act of inquiring where Plaintiff would be staying while on a work-related trip. Especially in light of the fact that Gonzales was Plaintiff's supervisor.

Plaintiff also offers summary judgment evidence that she saw Gonzales stand "very close" to an auditor named Carolyn Hill as evidence that Gonzales continued to harass female employees after December 9, 1992. Pfau Affidavit, Page 6, Para. 22. Defendant argues that this is not credible summary judgment evidence because Plaintiff had no way of knowing that Hill did not consent to this contact. The Court finds that Plaintiff is attempting to relate matters outside her personal knowledge. *Wallace v. Texas Tech University*, 80 F.3d 1042. The Court agrees and sustains the Defendant's objection to this portion of Plaintiff's summary judgment evidence. Plaintiff also claims that Gonzales made off-duty telephone calls to Kirschbaum and Gladys Mata after December 9, 1992. Plaintiff does not offer competent summary judgment evidence that these women found these calls from Gonzales unwelcome or offensive. Plaintiff relies on the affidavit of Kirschbaum and the deposition of Gonzales in support of her argument that this

conduct was improper. Defendant counters this argument in its Supplemental Appendix to Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment, with Summary of Facts, Supporting Affidavits and Other Pertinent Documents (Clerk's Doc. No. 71). In this Appendix, Defendant explains that Gonzales maintained a mutually consensual personal relationship with Mary Lou Kirschbaum in 1988. Kirschbaum Deposition, Page 19, Lines 17-25; Pete Gonzales Deposition Page 122, Lines 11-23. This relationship ceased in 1991. Furthermore, Defendant offers summary judgment evidence that Kirschbaum was not aware of Gonzales making sexual advances toward or dating other women at DCAA. Kirschbaum Deposition, Page 28.

Defendant acknowledges that because of Gonzales' friendships with Mary Lou Kirschbaum and Gladys Mata, Gonzales did continue to speak on the phone to these two women after December 9, 1992. Gonzales Deposition, Page 143, Lines 15-25. The Court has carefully reviewed the summary judgment evidence proffered by the Plaintiff, and finds that she has not offered credible summary judgment evidence that Gonzales' conduct with Kirschbaum or Mata was improper. In light of the foregoing, the Magistrate Court finds there is no summary judgment evidence that the calls to Kirschbaum and Mata were unwelcome or offensive.

Defendant's Reply.

Defendant argues that Gonzales is and was not Plaintiff's "employer" as a matter of law and that Defendant is entitled to summary judgment on the issue of *respondeat superior*. Defendant offers summary judgment evidence that during the relevant period of time Gonzales was a supervisory auditor. As such he did not have the authority to hire (Gonzales Deposition, Page 169, Lines 6-8); Gonzales could make recommendations

on performance awards, but did not have the authority to award performance awards (Gonzales Deposition, Page 35, Lines 21-35); and that Gonzales could recommend disciplinary action, but that such recommendation was not necessarily taken (Gonzales Deposition, Page 96, Lines 12-14). Defendant further argues that it is not strictly liable for the alleged conduct of Gonzales. In the absence of evidence that Defendant was aware of the conduct and permitted or condoned the allegedly harassing conduct, Defendant argues that Plaintiff has misconstrued *Meritor* when she states that Defendant is strictly liable for the actions of its supervisory employees. Defendant argues that in *Meritor* the Supreme Court determined that agency principles may be considered in determining liability in a given case. Defendant argues that in *Meritor*, the Supreme Court held that employers were not absolutely liable for sexual harassment by their supervisors. Defendant further argues that the Fifth Circuit has consistently refused to impose strict employer liability for the actions of supervisory employees. *Ellert v. University of Texas at Dallas*, 52 F.3d 543, 545 (5th Cir. 1995); *DeAngelis v. El Paso Municipal Police Officers Association*, 51 F.3d 591, 593 (5th Cir. 1995).

Defendant relies on other cases concerning allegations of sexual harassment by a supervisor. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 448 (5th Cir. 1994); *Nash v. Electrospace Systems, Inc.*, 9 F.3d 401, 402-403 (5th Cir. 1993); *Collins v. Baptist Memorial Geriatric Center*, 937 F.2d 190, 192 (5th Cir. 1992); *B.T. Jones v. Flagship International*, 793 F.2d 714, 716 (5th Cir. 1986); and *Valdez v. Church's Fried Chicken*, 683 F.Supp 596, 605, 619-20 (W.D. 1988). Defendant argues that all of these cases rebut the cases that Plaintiff relies on to support her contention that the cases cited in Defendant's motion all involve harassment by co-workers and not supervisory employees. Defendant distinguishes Plaintiff's reliance upon *Flanagan*, because that case involved race

discrimination, and not sexual harassment. The Court agrees with Defendant's analysis. The Court's reasoning is set forth in the "Analysis" section of this Order.

Defendant also contends that Plaintiff has failed to present any summary judgment evidence that DCAA knew or should have known of her sexual harassment by Gonzales prior to December 9, 1992; that DCAA failed to take prompt remedial action when it learned of the harassment; or that his alleged harassment of Plaintiff did not cease after December 9, 1992. Defendant offers uncontroverted summary judgment evidence that Gonzales has never been accused of discrimination or sexual harassment by any DCAA employee other than Marie Pfau. Gonzales Deposition, Page 120, Lines 2-5. Also, Defendant offers that Gonzales has denied that any other DCAA employee has informed him that his actions were unwelcome or requested that he not make personal comments. Gonzales Deposition, Page 136, Lines 8-25. Defendant maintains that Plaintiff's April 16, 1992, letter did not put DCAA on notice of harassment by Gonzales because it is not focussed [sic] on his actions, but on the actions of other females. In the Fifth Circuit, same-sex harassment does not form the basis of a claim under Title VII. *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 120 (5th Cir. 1996). Moreover, Defendant contends that Plaintiff's reference to an August 19, 1992 letter by Michael Gonzales regarding his meeting with Plaintiff and Plaintiff's letter of September 12, 1992 also fail to establish that Gonzales' supervisors at DCAA was aware of sexual harassment of Pfau prior to December 9, 1992. to [sic] the contrary, Michael Gonzales' letter states "she [Pfau] made it clear that no one individual has sexually harassed her" and "Ms. Pfau feels that the next thing she expects is to get fired due to poor work performance." The letter also states that Michael Gonzales met with Pete Gonzales, Low, Soto, and Kirschbaum and went over sexual harassment training material "to ensure that they were

aware of their responsibilities in this area." Pfau Exhibit No. 5. Defendant contends that the September 12, 1992, letter also did not apprise DCAA of any sexually harassing treatment of Plaintiff by Gonzales. In this same letter, Defendant points out that Plaintiff seems concerned about DCAA's treatment of herself and Gonzales, her alleged harasser. Furthermore in the letter Pfau states that "The responsibility of management to prevent forms of sexual harassment is not being performed." The Court notes that in this letter Plaintiff fails to identify Gonzales as a harasser, nor does she refer to any incident of harassment involving either herself or others.

Lastly, Defendant maintains that the proffered summary judgment evidence establishes that once DCAA was notified of Plaintiff's sexual harassment allegations on December 9, 1992, it immediately took actions to ensure that such actions did not occur again and that such activity by Gonzales had ceased. Defendant offers that after Pfau's December 9, 1992 complaint, DCAA ordered Gonzales to stop calling Plaintiff and that the evidence indicates that he did so. Gonzales Deposition, Page 136, Lines 8-25. Defendant asserts that the July 1993 conversation in which Gonzales inquired into the location of her accommodations was not "sexual harassment" but was a legitimate business question. Regardless, Defendant argues that such a conversation would not fall within the definition of sexual harassment and therefore does not qualify as evidence of sexual harassment continuing after December 9, 1992.

Objections.

In considering the various motions before the Court, the Court has taken into account the various objections of the parties to affidavits and other proffered summary judgment evidence. First the Court addresses Plaintiff's Objections to Defendant's Summary Judgment Evidence (Clerk's Doc. No. 67). After careful consideration of Plaintiff's contentions, the

Court respectfully OVERRULES Plaintiff'S objections. Also before the court is Defendant's Objections to Plaintiff's Evidence in Opposition to Defendant's Motion for Summary Judgment (Clerk's Doc. No. 70). The Court OVERRULES Defendant's objection. Lastly, before the Court is Plaintiff's Objections to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Dismissal of Plaintiff's Sexual Harassment Claims or in the Alternative for Partial Summary Judgment (Clerk's Doc. No. 72). After careful consideration of Plaintiff's contentions, the Court respectfully OVERRULES Plaintiff's objections. In ruling upon these objections the Court is in no way making an ultimate determination regarding the admissibility of this evidence at trial, the Court simply declines to strike this evidence in ruling upon the motions now at hand.

Analysis.

The Court finds that Plaintiff has failed to establish that a genuine issue of material fact exists with regard to the *respondeat superior* element of her *prima facie* case against Defendant for her claims of *quid pro quo* and hostile work environment. Plaintiff failed to proffer evidence to counter Defendant's summary judgment evidence establishing that no genuine issue of material fact exists as to whether the Defendant DCAA knew or should have known of the harassment in question and failed to take prompt remedial action.

First, Defendant has pointed out the absence in the record of any evidence establishing that Defendant knew or should have known of the alleged harassment of Plaintiff by Gonzales. Defendant has offered abundant uncontroverted summary judgment evidence that Gonzales' supervisors at DCAA were unaware of the alleged harassment of Plaintiff by Gonzales until Plaintiff's letter of December 9, 1992; and after that date the harassment ceased. Plaintiff has failed to establish the existence of a genuine issue of material fact as to knowledge. She has

provided no affidavits or other summary judgment evidence that other DCAA employees or management witnessed any harassing or hostile conduct by Gonzales or that Plaintiff informed either Gonzales or the Defendant that his conduct was unwelcome prior to December 7, 1992.

The Court finds Plaintiff's argument that Gonzales qualified as Plaintiff's "employer" at the time he harassed Plaintiff and thus knowledge should be imputed to DCAA is without merit. The Court finds, as a matter of law, that Gonzales did not qualify as Plaintiff's "employer" for the purposes of knowledge under the legal theory of *respondeat superior*. Plaintiff's reliance on *Meritor* is misplaced and her interpretation of that case is erroneous. The Court finds that *Meritor* does not hold that a defendant is strictly liable for the actions of its employees. Moreover, the Court finds that knowledge of discriminatory conduct cannot be imputed to supervisors from those actions. *See Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993).

The Court also finds that Gonzales, actions did not fall within the scope of his authority as a Supervisory Auditor. The Defendant has offered summary judgment evidence that Gonzales did not have the authority to hire, fire, reward or discipline Plaintiff. The Fifth Circuit has restrictively construed the term "employer" to include only supervisory personnel with the ability to hire and fire. *Garcia v. Elf Atochem North America,*, 8 F.3d 446 (5th Cir. 1994). Thus Gonzales cannot, as a matter of law, qualify as Plaintiff's "employer" under Title VII.

Furthermore, the Court finds that Defendant has offered adequate summary judgment evidence to persuade the Court that no genuine issue of material fact exists as to whether the Defendant had been informed of any other alleged harassment of Plaintiff before December 1992. Plaintiff's proffered letter dated April 16, 1992, does not relate to her allegations against

Pete Gonzales. The letter also does not identify actions that qualify as sexual harassment because the letter only identifies the allegedly wrongful actions of other women. Furthermore, Plaintiff's claims of a "pervasive sexual atmosphere" in her workplace are unsupported by specific facts or situations that objectively qualify as sexually harassing. *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367 (1993) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). Plaintiff's other claims that she informed management of Gonzales' discriminatory actions, specifically the memo to Collins dated September 12, 1992, qualify as no more than general complaints unrelated to specific people or events. Thus, the Court finds, as a matter of law, that Defendant did not know and could have known of the alleged harassment and the alleged harassing atmosphere until Plaintiff made her complaint in December, 1992.

No genuine issue of material fact exists as to whether Gonzales' allegedly sexually harassing behavior continued after December 1992 and whether Defendant knew or should of known this. First, Plaintiff's proffered evidence of Gonzales' inquiry into where she would be staying while on business in Corpus Christi does not objectively qualify as sexual harassment. *Harris*, ___ U.S. ___, 114 S.Ct. 367 (1993). Plaintiff's contentions that Gonzales called Kirschbaum and Mata at home after work does not qualify as sexual harassment without their own attestation that such calls were unwelcome or harassing.

Moreover, Defendant has pointed out the absence in the record of any evidence establishing that once the employer was apprised of Ms. Pfau's complaint, that DCAA failed to take prompt remedial action. The Court finds that, as a matter of law, Defendant took prompt and appropriate remedial action. *Carmon v. Lubrizol*, 17 F.3d 791 (5th Cir. 1994). Defendant has proffered evidence that it took prompt remedial action by scheduling a meeting with Plaintiff, Gonzales, and EEOC

Counselor Paula McFarland on December 21, 1992, in which Gonzales was instructed not to contact Plaintiff at home. Defendant offers summary judgment evidence that Plaintiff deemed the problem "solved" at that time and requested that no further action be taken. *See* Marie Pfau Deposition; Affidavit of Paula McFarland. Gonzales' own supervisor admonished him for his improper conduct and Gonzales attended required DCAA EEO training on sexual harassment. Title VII does not require that the employer use the most serious sanction available to punish offender, particularly when the offense is his first documented offense. *Waymire v. Harris County, Texas*, 86 F.3d 424 (5th Cir. 1996) . Furthermore, after Plaintiff's April 16, 1992 letter, DCAA investigated the complaint and notified supervisors of their duties in this area. The Court finds that Plaintiff's claims that the DCAA's reaction lacked promptness are without merit. *Waymire* at 429 (even a three-month delay qualifies as prompt under the "promptness" prong of Title VII considering the employer's lines of command and organizational format). The Court finds that in the circumstances, the Defendant's actions were prompt, appropriate, and remedial.

Conclusion.

Defendant has demonstrated that no genuine issues of material fact exist as to the fifth factor of Plaintiff's *quid pro quo* and hostile environment sexual harassment claims.

Therefore, it is ORDERED that:

1) the defendant's motion for partial summary judgment on the plaintiff's, Marie Pfau, hostile environment sexual harassment claim, is hereby, GRANTED,
2) the defendant's motion for partial summary judgment on the plaintiff's quid pro quo sexual discrimination claim, is hereby, GRANTED.

SIGNED this the 16th day of August, 1996.

Alan D. Albright

ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARIE PFAU	§	
	§	
V.	§	A-95-CA-135 AA
	§	
WILLIAM REED, IN HIS	§	
OFFICIAL CAPACITY	§	
AS DIRECTOR OF THE	§	
DEFENSE CONTRACT	§	
AUDIT AGENCY	§	

ORDER

Before the Court is Plaintiff's Motion for Reconsideration (Clerk's Doc. No. 82) and accompanying affidavits.

The Court has carefully reviewed the foregoing and finds that these additional affidavits do not in any way merit a reversal of the Court's grant of Defendant's Motion for Partial Summary Judgment. Accordingly, the Court DENIES Plaintiff's Motion for Reconsideration.

SIGNED this the 3rd day of September, 1996.

Alan D. Albright
ALAN D ALBRIGHT
UNITED STATES MAGISTRATE JUDGE